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NOTES.

BASIS FOR THE SURVIVAL OF POWERS COUPLED WITH AN INTEREST.—The authority to encumber or dispose of property, given to a stranger without interest therein, is a bare power which the donee must execute in the name of the donor;[1] and, on the principle *qui facit per alium facit per se,* the act is in reality that of the principal and not that of the agent.[2] Moreover, the power of one man to act for another depends on, and therefore cannot outlive, the will of the latter, and as a general rule it is accordingly revocable at any time during his life.[3] Since, however, the act authorized can only be such as the principal could perform at the time of the execution of the power, the authority is necessarily extinguished by his death.[4] A dead man can do no act;

[1]Jeffersonville Ass'n *v.* Fisher (1856) 7 Ind. 699; McGriff *v.* Porter (1853) 5 Fla. 373; Bergen *v.* Bennett (N. Y. 1804) 1 Caines 1.

[2]Hunt *v.* Rousmanier (1823) 8 Wheat. 174.

[3]Frank *v.* Roe (1886) 70 Cal. 296, 306.

[4]Hawley *v.* Smith's Adm'r (1873) 45 Ind. 183, 203.

and neither the existence of a contract, which is deemed to render the power irrevocable during life, nor the clearest intention that it should survive, will prevent it from perishing with the donor.[5] On the other hand, it is often stated as a maxim, that a "power coupled with an interest" is not affected even by the death of the donor;[6] but the frequency with which this principle has been employed is only parallelled by the inaccuracy of its application in many modern cases.[7] Thus it has been held that the mere interest of the donee of a power in the proceeds of certain rents to be collected would preserve the power to collect them from extinction even by the death of the donor;[8] but again, the doctrine of these cases has been rejected on the ground that the power was extinguished by its exercise before the interest came into existence.[9] An analysis of this reasoning indicates that it is based rather on a mere construction of the words "power coupled with an interest" than upon any understanding of the fundamental principles involved. A similar explanation, moreover, would seem to account for the statement sometimes made that any interest in the subject-matter, present or future,[10] legal or equitable,[11] is sufficient.

It is submitted, however, that a study of these basic principles will reveal a theory which if consistently applied, will bring order out of this chaos. It has been shown that any power which must be exercised in the donor's name, that is, a power simply collateral, perishes with him, and it accordingly follows that no authority can survive unless its exercise is to be in reality the act, not of the donor, but of the donee himself. Thus if a person seised in fee granted a power of attorney to a stranger to deliver seisin to another, the stranger, not having been seised himself, made livery in the name and as the act of the grantor.[12] So also if one made a deed of feoffment to another, and gave a letter of attorney to a stranger to deliver seisin to the feoffee, the power, if unexecuted, was extinguished at the death of the donor, and the tenements passed to his heirs.[13] Conversely, whenever the agent, in addition to a mere power, was given sufficient interest or estate in the subject-matter to be clothed with authority to act in his own name, the power could not be destroyed by the principal's death.[14] Accordingly, if the owner seised in fee enfeoffed one for life

[5]Pacific Coast Co. *v.* Anderson (1901) 107 Fed. 973.

[6]Hunt *v.* Rousmanier *supra.*

[7]"The power coupled with an interest cannot be revoked by the person granting it, but is necessarily revoked by his death. How can a valid act be done by a dead man?" Lord Ellenborough in Watson *v.* King (1815) 4 Campb. *272*; see also Taylor *v.* Benham (1847) 5 How. 233; Knapp *v.* Alvord (N. Y. 1843) 10 Paige 205.

[8]Stevens *v.* Sessa (N. Y. 1900) 50 App. Div. 547.

[9]Hunt *v.* Rousmanier *supra.*

[10]See Bergen *v.* Bennett *supra.*

[11]Osgood *v.* Franklin (N. Y. 1816) 2 Johns. Ch. 1, 20. Although an equitable interest in the donee might be sufficient to support a power to appoint an equitable successor, there is no logical principle by which it could cause a power to convey a legal estate to survive.

[12]1 Preston, Abstract of Titles, 293.

[13]Litt., Tenures, § 66.

[14]Sulphur Mines Co. *v.* Thompson (1896) 93 Va. 293, 310; Hunt *v.* Ennis (1821) Fed. Cas. 6,889; Toovey *v.* Turner (1907) 76 L. J. Ch. 213; Benneson *v.* Savage (1889) 130 Ill. 352, 365; *contra,* Frederick's Appeal (1866) 52 Pa. 338.

and made livery of seisin to him, at the same time granting him an authority, in the nature of a power appendant to his estate, to convey to a third person in fee, the donee, seised in fact, made livery as his own act, and the grantee received the seisin, not from the original owner, who was no longer seised, but from the donee of the power, and, by virtue of the authority of the donor, received it free from claims by or through him, thus being endowed with an estate greater than the donee had ever had. By the making of the deed and the giving of the additional power, the grantor had done all that was necessary on his part to complete the alienation, and his continued life was therefore unnecessary to preserve the existence of the power.[15] It follows from the same principle, that where the grantor gave with the life estate an authority to devise in fee, thus creating a power in gross, the authority survives, and the appointment made thereunder is good. These principles were involved in the recent case of *Dixon* v. *Dixon* (Kan. 1911) 116 Pac. 886. A husband having conveyed real property to his wife for life, with a power to devise the fee to one or more of the children, died before she made the appointment, and the Supreme Court of Kansas quite properly held that the appointment was good. A consistent application of the foregoing doctrines, it is submitted, would have avoided the confusion which, as above indicated,[16] prevails among the authorities. A great part of these cases apparently result in a rule giving the donee of the power an authority to compel the heir or personal representative of the donor to make the disposition of the subject-matter necessary to effectuate the latter's intention, and ignore the true limitations of the much abused maxim that a power coupled with an interest survives.

EXERCISE OF A POWER OF APPOINTMENT AS AFFECTING THE RELATION OF THE APPOINTOR TO THE SUBJECT-MATTER.—A power of appointment being a power of disposition given to a person over property not his own by one who directs the mode in which that power shall be exercised,[1] the existence of such a power implies no other relation between the subject-matter and the donee than a mere authority on the part of the latter to designate the person to whom the property is to go. The donee takes no estate by virtue of the power,[2] and even in the case of a life estate, the fact that the holder may have a power to appoint the remainder does not enlarge or affect that estate.[3] Nor is a power liable to be attached or taken in execution.[4] Consequently property subject to a power of appointment is in no sense assets of the appointor so long at least as the power remains unexecuted.[5] Thus if one by will authorizes his executors to sell his lands they are able to give a good title; yet the executors thereby take no estate, that being

[15]See Co. Litt., (Hargrave's 13th ed.) 52-*b*; 1 Sugden, Powers, (7th ed.) 122.

[16]See cases cited in note 7 *supra*.

[1]Freme *v.* Clement (1881) 50 L. J. Ch. 50; see Farwell, Powers, 1.

[2]Goodill *v.* Brigham (1798) 1 B. & P. 192; Burleigh *v.* Clough (1872) 52 N. H. 267; Farwell, Powers, 2.

[3]Livingston *v.* Murray (1877) 68 N. Y. 485.

[4]Holmes *v.* Coghill (1806) 12 Ves. Jr. 206.

[5]*Ex parte* Gilchrist (1886) L. R. 17 Q. B. D. 521.